

LEGISLATIVE BILL 110

Approved by the Governor June 8, 1993

Introduced by Lindsay, 9; Crosby, 29; Dierks, 40; Witek, 31

AN ACT relating to abortion; to amend sections 28-326 and 28-327, Reissue Revised Statutes of Nebraska, 1943; to change provisions relating to informed consent; to define and redefine terms; to provide duties for certain physicians, their agents, and the Department of Health; to provide for immunity, for civil liability, and for anonymity; to eliminate a penalty; to provide severability; and to repeal the original sections, and also section 28-328, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 28-326, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

28-326. ~~As used in~~ For purposes of sections 28-325 to 28-345 ~~and sections 3 to 7 of this act,~~ unless the context otherwise requires:

(1) ~~Abortion shall mean an act, procedure, device, or prescription administered to a woman known by the person so administering to be pregnant and performed with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman, except that in cases in which the unborn child's viability is threatened by continuation of the pregnancy, early delivery after viability shall not be construed as an abortion for the purposes of sections 28-325 to 28-345~~ the use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child, and which causes the premature termination of the pregnancy;

(2) Hospital shall mean those institutions licensed by the Department of Health pursuant to sections 71-2017 to 71-2029;

(3) Physician shall mean any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

(4) Pregnant shall mean that condition of a woman who has unborn human life within her as the result of conception;

(5) Conception shall mean the fecundation of the ovum by the spermatozoa;

(6) Viability shall mean that stage of human development when the unborn child is potentially able to live more than merely momentarily outside the womb of the mother by natural or artificial means;

(7) Emergency situation shall mean that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function; and

(8) Probable gestational age of the unborn child shall mean what will with reasonable probability, in the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed. a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman;

~~(8) Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of possible alternatives to abortion, including childbirth and adoption, and that there are agencies and services available to assist her to carry her pregnancy to a natural term, (b) of the abortion procedures to be used, (c) of the particular risks associated with the abortion procedures to be employed in her case, and (d) that there are agencies and services available for prevention of future unintended pregnancies. The person providing the information specified in subdivision (8) of this section to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health, abortion technology, contraceptive technology, short term counseling skills, community resources and referral, and informed consent. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician; and~~

~~(9) The word signature includes the mark of a person unable to write her name. A mark shall have the same effect as a signature when the name is written by some other person and the mark is made near thereto by the person unable to write her name.~~

Sec. 2. That section 28-327, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

28-327. No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed. Except in the case of an emergency situation, consent to an abortion is voluntary and informed only if:

(1) The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by a licensed physician assistant or registered nurse who is an agent of either, at least twenty-four hours before the abortion:

(a) The particular medical risks associated with the particular abortion procedure to be employed including, when medically

accurate, the risks of infection, hemorrhage, and danger to subsequent pregnancies and infertility;

(b) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(c) The medical risks associated with carrying her child to term.

The person providing the information specified in this subdivision to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referral; and informed consent. The physician or the physician's agent may provide this information by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied by the patient and whatever other relevant information is reasonably available to the physician or the physician's agent;

(2) The woman is informed by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion;

(a) The name of the physician who will perform the abortion;

(b) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(c) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(d) That she has the right to review the printed materials described in section 3 of this act. The physician or his or her agent shall orally inform the woman that the materials have been provided by the Department of Health and that they describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to review the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee. The physician and his or her agent may disassociate themselves from the materials and may comment or refrain from commenting on them as they choose;

(3) The woman certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2)(a), (b), and (c) of this section has been furnished her and that she has been informed of her right to review the information referred to in subdivision (2)(d) of this section; and

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his or her agent receives a copy of the written certification prescribed by subdivision (3) of this section. on any

woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency endangers the life or health of the woman and the woman is unable to give informed consent.

Sec. 3. (1) The Department of Health shall cause to be published, within sixty days after the effective date of this act, the following easily comprehensible printed materials:

(a) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies and agencies and services for prevention of unintended pregnancies, which materials shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers and addresses in which such agencies may be contacted or printed materials including a toll-free, twenty-four-hour-a-day telephone number which may be called to orally obtain such a list and description of agencies in the locality of the caller and of the services they offer; and

(b) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including pictures or drawings representing the development of unborn children at the two-week gestational increments, and any relevant information on the possibility of the unborn child's survival. Any such pictures or drawings shall contain the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The materials shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion, the medical risks commonly associated with abortion, and the medical risks commonly associated with carrying a child to term.

(2) The materials shall be printed in a typeface large enough to be clearly legible.

(3) The materials required under this section shall be available from the department upon the request by any person, facility, or hospital for an amount equal to the cost incurred by the department to publish the materials.

Sec. 4. When an emergency situation compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his or her judgment that an abortion is necessary to avert her death or to avert substantial impairment of a major bodily function.

Sec. 5. No civil liability for failure to comply with subdivision (2)(d) of section 28-327 or that portion of subdivision (3) of

such section requiring a written certification that the woman has been informed of her right to review the information referred to in subdivision (2)(d) of such section may be imposed unless the Department of Health has published and made available the printed materials at the time the physician or his or her agent is required to inform the woman of her right to review them.

Sec. 6. Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of such section shall be prima facie evidence of professional negligence. The written certification prescribed by subdivision (3) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

Sec. 7. In every civil action brought pursuant to section 6 of this act, the court shall rule whether the anonymity of any woman upon whom an abortion is performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion by a party or on its own motion, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone given standing under section 6 of this act who brings a civil action under such section shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Sec. 8. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 9. That original sections 28-326 and 28-327, Reissue Revised Statutes of Nebraska, 1943, and also section 28-328, Reissue Revised Statutes of Nebraska, 1943, are repealed.